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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-210

LAURENCE H. FROMMHAGEN, Petitioner,

vs.

BYRON N. SCOTT, Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the District of Columbia Court of Appeals

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Subject Index

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement of the case	2
Reasons for granting the writ	7
I. The decision below in regard to the legality and admissibility of consensual recordings of telephone conversations conflicts with the decisions of this Court and other Courts of Appeals	8
II. The decision below barring admission of a sworn extrajudicial statement is in conflict with the decisions of this Court and other Courts of Appeals and constitutes a radical and unacceptable departure from accepted judicial process	10
Conclusion	12
Appendix	i

Table of Authorities Cited

Cases	Pages
Butler vs. Southern Pacific Co. 431 F2d 77, 80 (1970)	11
Carnes vs. United States 295 F2d 598 (1961), cert den 369 US 861, 8 L Ed 2d 19, 82 S Ct 949	8
Gonzales vs. Landon 215 F2d 955 (1954)	11
Great American Ind. Co. vs. Rose 242 F2d 269	12
Harrison vs. United States 42 F2d 736 (1930)	11
Frank R. Jelleff, Inc. vs. Braden 233 F2d 671 (1956)	12
Meredith vs. Gavin 446 F2d 794 (1971)	9
People vs. Canard 257 C.A. 2d 444 (1967)	9
Pope vs. Allis 115 US 363 (1885)	12
Rapid Transit Lines vs. Wichita Developers, Inc. 435 F2d 850 (1970)	12
Rathbun vs. United States 355 US 107, 2 L Ed 2d 134, 78 S Ct 161 reh den 355 US 925, 2 L Ed 2d 355	8
Rogers vs. United States 369 F2d 944 (1966), cert den 388 US 922 reh den 389 US 890	9
United States vs. Goldberg 290 F2d 729 (1961)	11

Statutes

18 United States Code, Sections 2510 et seq.
District of Columbia Criminal Code, Section 23-542(b)(3)
California Penal Code, Section 632(c)

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No. .

LAURENCE H. FROMMHAGEN, Petitioner,

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PETITION FOR A WRIT OF CERTIORARI
to the District of Columbia Court of Appeals

Petitioner, Laurence H. Frommhagen, respectfully prays that a writ of certiorari issue to review a denial of an appeal by the District of Columbia Court of Appeals on February 28, 1973. A timely petition for rehearing was denied by that Court on April 9, 1973. On July 10, 1973, the Honorable Warren Burger, Chief Justice of the Supreme Court of the United States, granted an extension of time in which to file this petition for writ of certiorari to and including August 1, 1973.

OPINIONS BELOW

The judgments and orders of the District of Columbia Court of Appeals and the District of Columbia Superior Court are shown in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Petitioner seeks to invoke an exercise of this Court's review for the reasons that the District

of Columbia Court of Appeals has rendered decisions in conflict with decisions of the Supreme Court of the United States and of other courts of appeals and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

QUESTIONS PRESENTED

1. Did the courts below err by refusing to accept into evidence, for the purpose of impeaching testimony, magnetic tape recordings of telephone conversations between plaintiff and defendant for the reason that plaintiff, who recorded the conversations, did not inform verbally, in so many words, that the conversations were being recorded?

2. Did the courts below err by refusing to accept into evidence, for the purpose of impeaching testimony, the sworn answer of defendant to plaintiff's complaint before a grievance committee attached to another, and separate, court?

STATEMENT OF THE CASE

On February 6, 1969, respondent Byron N. Scott (hereinafter referred to as Scott) and petitioner Laurence H. Frommhagen (hereinafter referred to as Frommhagen) entered into a retainer agreement in which Scott pledged to represent Frommhagen before the United States Supreme Court in the matter of Frommhagen v. Glazer, an appeal then pending in the United States Court of Appeals for the Ninth Circuit should the latter court reject that appeal.

Scott renewed his pledge after the appeals court denied that appeal on April 27, 1971. From the latter date until September 6, 1971, Scott repeatedly assured Frommhagen and Frommhagen's San Francisco attorney that he would file in a timely fashion a petition for writ of certiorari in that action. However, on September 6, 1971, Frommhagen received in the mail from Scott a draft copy of said petition with the notation "pro se" on the cover page. On that day Scott informed the

petitioner that he had decided not to represent him and that Frommhagen was "on his own." The next day Frommhagen's California attorney determined that the last day of the ninety day period in which to file the petition for writ of certiorari had elapsed on the very day Frommhagen received the petition draft from Scott.

Frommhagen immediately filed with this Court an out-of-time application for an extension of time in which to file the petition for writ of certiorari; said application was granted by the Honorable William O. Douglas, Associate Justice of the United States Supreme Court, on September 27, 1971. The petition for writ of certiorari was subsequently filed and, as No. 71-582, was denied without comment on January 17, 1972.

In October of 1971, Frommhagen, anxious that this Court should recognize that the out-of-time filing of the petition was due to the malfeasance of his attorney, initiated the following two actions:

1. An action in the Small Claims Court of the District of Columbia in which Frommhagen prayed for damages in the amount of $600, equal to the retainer he had paid Scott and some small expenses occasioned by the out-of-time application for an extension of time, and

2. A grievance with the Grievance and Admissions Committee of the United States District Court for the District of Columbia in which Frommhagen requested that appropriate disciplinary action be taken against Scott in regard to Scott's false assurances to Frommhagen that he would represent Frommhagen, those assurances having persisted until the last day the petition for writ of certiorari could be filed in a timely fashion.

Scott filed a counterclaim with the Small Claims Court in which he requested $50,000. in damages for Frommhagen's "libelious" statements to the Washington Bar Association as well as $800. for legal fees. By means of that and other legal maneuvers Scott succeeded in having the action in the small claims

court certified to the Superior Court of the District of Columbia and in delaying the trial until May of 1972.

In April of 1972 Scott filed his sworn Answer with the Grievance Committee of the United States District Court in regard to Frommhagen's grievance complaint. That Committee took no action. The processing of the grievance, at Frommhagen's insistence, was resumed, but only after it had been transferred to the newly-formed Disciplinary Board of the District of Columbia Bar in January 1973.

Three days before the trial in Superior Court, that Court conducted a pre-trial conference, at the conclusion of which the Court ordered Frommhagen's complaint as to misconduct on the part of Scott, to be fully adjudicated.

During the trial before the Superior Court of the District of Columbia on May 25 and 26, 1972, Scott testified that during certain telephone conversations he had held with Frommhagen during August of 1971 he had made certain demands of Frommhagen as to additional legal fees and court expenses and as to the printing of the petition for writ of certiorari. In an effort to impeach that testimony, and to demonstrate that such demands had never been made, Frommhagen sought to introduce magnetic tape recordings of the subject telephone conversations. Inasmuch as the judgments and orders of the District of Columbia Appeals Court and Superior Court (see Appendix) fail to comment upon the ruling of the trial judge, said ruling is shown below, as excerpted from the official transcript of the hearing:

> THE COURT: Well, I am ready to rule. I will exclude the recording of the telephone conversations. First of all, in the exercise of my discretion I feel that I have heard ample evidence from the testimony here so that it is questionable whether it is even advisable to go to this length purely on impeachment purposes, but aside from that I have serious doubts as to whether the requirements of the

Federal Communications Commission have really been complied with if you did not explicitly tell the man that your conversation is being recorded. Now there are variations and implications as in every case so it could be argued as you do here that a beep tone puts him on notice so you don't have to tell him, but a beep tone could mean a lot of things. An express statement that you are being recorded can mean only one thing, "you are being recorded" but in the circumstances of this case I don't propose to hear the tape recordings. Let the record show that the plaintiff has them in court. They are available to be played but the Court excluded them so it is on the record-your position is well stated. If you wish to protect yourself further you can, and I give you leave to do it, file a short written statement of the cases you rely on, to be filed in this case so it will show your position even more clearly.

At another point in his testimony Scott asserted that he had known that the ninety day period for filing the petition for writ of certiorari tolled from the day of entry of the court's denial of the petition for rehearing. However, in his sworn Answer to the Grievance Committee Scott admitted that he had believed erroneously that said period tolled from the day the Appeals Court issued its mandate. Frommhagen's attempt to introduce that sworn Answer of Scott was met with the following ruling by the trial judge:

> THE COURT: All right. Here's my ruling. Normally, prior inconsistencies, statements, or statements made before the time of trial by one of the parties can be used to impeach. I know of no case where subsequent- that is subsequent statements made after the matter

> in question, but before the trial was completed, have been used as the basis for impeachment. It is conceivable that you could look at this document here as an impeachment document which is prior to this trial and after this incident, and therefore let it in. However, it seems to me that since this is a matter before the Grievance Committee, I am going to leave it there and in exercising my discretion, I will rule that I will exclude it.

On June 7, 1972, the Superior Court rendered the Memorandum Order shown in the Appendix herein. No mention was made in that decision as to the Court's rulings on the admissibility of the recordings of the telephone conversations and Scott's sworn statement before the Grievance Committee. In that decision the Court ruled against Frommhagen's claim for $600. and Scott's counterclaim for $50,800.

Frommhagen appealed to the District of Columbia Court of Appeals and urged as the two principal issues those same two issues he now poses to this Court in this petition.

In October of 1972, shortly after he had filed his opening brief in the District of Columbia Court of Appeals, Frommhagen disappeared from his habitat in California and was found four weeks later in a semi-conscious state. In December 1972, Frommhagen, who had been assured by his physician that his amnesia would relent in a short time and who indeed was remembering much after reviewing his records, requested the Court of Appeals, which had noticed oral argument in the appeal for December 10, 1972, and the Grievance Committee, to suspend all further action until he regained his full faculties. The Court of Appeals responded by ordering the matter submitted on the briefs without oral argument. The Disciplinary Board of the District of Columbia Bar notified Frommhagen on January 4, 1973, that his grievance, posted in October of 1971, had been transferred to that Board and on January 22, 1973, notified Frommhagen that the grievance had been dismissed. That Board did not

respond to earlier requests by Frommhagen for the opportunity to submit further evidence, including the tape recordings of the telephone conversations, and has not replied to Frommhagen's request for a reopening of the proceeding.

On February 23, 1973, the District of Columbia issued the order denying the appeal in Frommhagen vs. Scott. Despite a plea by Frommhagen in his petition for rehearing that the Court render an opinion, the Court did not do so.

On three separate occasions in November 1971, April 1972, and July 1972, the chairman of the Grievance Committee informed Frommhagen that the decision of the Superior Court would be controlling in regard to any action by that Committee on the grievance complaint.

In April of 1973, as disclosed in a newspaper article shown in the Appendix at page v., the Sheriff of Santa Cruz County, California, announced that no definitive explanation had been found for the disappearance of Frommhagen in October 1972 and stated it was possible that Frommhagen had been drugged.

Parenthetically it is noted that Frommhagen, during a hearing before the United States Civil Service Commission in regard to his dismissal in 1968 from the National Aeronautics and Space Administration (NASA), sought to introduce into evidence tape recordings of telephone conversations between federal officials, who were his superiors, and himself in order to impeach their testimony. The hearing examiner refused to listen, much less to agree to the introduction of, those tape recordings, and NASA officials threatened legal action against Frommhagen if he disclosed those recordings. The ruling of the hearing examiner was identical to that of the trial judge in Frommhagen v. Scott.

REASONS FOR GRANTING THE WRIT

The circumstances in this entire matter indicate that forces were at work to prevent a fair adjudication of petitioner's complaints against a member of the Bar of the District of Columbia. The District of

Columbia Superior Court, which explicitly agreed to adjudicate the complaints, barred evidence on the ground that the Grievance Committee was considering the complaints and then proceeded to rule on those complaints. On the other hand, the Grievance Committee took the position that, under the circumstances, it was the task of the Superior Court to adjudicate the complaints. The net effect was that Frommhagen was prevented from introducing very vital evidence in both proceedings.

I. THE DECISION BELOW IN REGARD TO THE LEGALITY AND ADMISSIBILITY OF CONSENSUAL RECORDINGS OF TELEPHONE CONVERSATIONS CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The District of Columbia Court of Appeals, in finding no error on the part of the lower court, has thereby established for that jurisdiction the rule that a party who records a telephone conversation, with or without beep tones being interjected at regular intervals during the conversation, is in violation of the regulations of the Federal Communications Commission if that party does not verbally apprise, in so many words, the other party to the conversation that the conversation is being recorded, and for that reason, the recordings are inadmissible as evidence, even for the purpose of impeaching the testimony of a witness.

That ruling collides with the opinion of this Court in Rathbun vs. United States, (1957) 355 US 107, 2 L Ed 2 134, 78 S Ct 161, reh den 355 US 925, 2 L Ed 2d 355, 78 S Ct 363. In that decision this Court ruled that the contents of a communication overheard on a regularly used telephone extension with the consent of one party are admissible in federal courts, that such communications are not privileged, and that the consenting party may use such a communication to his own benefit.

Following the reasoning of Rathbun the Fifth Circuit Court of Appeals in Carnes vs. United States, (1961) 295 F2d 598, cert den 369 US 861, 8 L Ed 2d 19, 82 S Ct 949, and the Tenth Circuit Court of

Appeals in Rogers vs. United States, (1966) 369 F2d 944, cert den 388 US 922, 18 L Ed 2d 1371, 87 S Ct 2125, reh den 389 US 890, 19 L Ed 2d 205, 88 S Ct 20, held that recordings of telephone conversations made by only one party to the conversation without the knowledge of the other party were not interceptions within the meaning of the regulations of the Federal Communications Commission and thus were admissible as evidence in the federal court.

The Eighth Circuit Court of Appeals in Meredith vs. Gavin (1971) 446 F2d 794 ruled that the recording, and disclosure of the recording to protect the valid interests of the recorder, of a telephone conversation without the knowledge of the other party is not violative of the federal wiretapping statutes at 18 U.S.C.A., Sections 2510 et seq., unless such recording and disclosure of recordings is done with an evil purpose, that is, to commit or attempt a criminal or tortious act. It is noted that the applicable statute of the District of Columbia, namely Section 23-542(b)(3) of the District of Columbia Criminal Code, which controlled at the time of the trial in this action, is a carbon copy of 18 U.S.C.A., Section 2511(2)(c,d). The latter two statutes specifically permit consensual recordings of telephone conversations, that is, with the consent of only one party, unless the purpose in making and disclosing those recordings is evil. Section 632(c) of the California Penal Code, operative at all times when Frommhagen was making those recordings, also permits consensual recordings of telephone conversations. The decision of the California Supreme Court in People vs. Canard (1967) 257 C.A. 2d 444 is in conformity with the rulings of the federal Appeals Courts previously cited herein.

During the preparation of this petition the issue of the legality and admissibility of consensual recordings of telephone conversations has come into sharp focus as a result of the disclosure that the President of the United States, Richard M. Nixon, has consented since April 1971 to the recording of his telephone conversations without the knowledge of the other parties to the conversations. There appears to be no question that

this practice of the President is legal and that disclosure of those recordings, either in his defense or in his prosecution, would also be legal. Indeed the Senate Select Committee on Presidential Campaign Activities as well as Special Prosecutor Archibald Cox have demanded the disclosure of those tape recordings and, on July 23, 1973, subpoenaed the President to disclose those recordings.

It is also noted that the same Senate Select Committee introduced into the record of its public proceeding a recording of a telephone conversation between John D. Ehrlichman and Herbert W. Kalmbach made by Ehrlichman without Kalmbach's knowledge. Neither Kalmbach, his attorney, or anyone else has objected on legal grounds to the admission of those tape recordings.

Petitioner asserts that the District of Columbia Courts are perfectly aware of the fallacious nature of their ruling in Frommhagen vs. Scott, as reflected in the refusal of the District of Columbia Court of Appeals to render an opinion in that appeal or to permit oral argument. Those courts were intent on suppressing that evidence, as was also the Grievance Committee, a denial of due process which merits and requires the supervision of this Court. To add insult to injury the District of Columbia Superior Court, sanctioned by the Court of Appeals, barred the impeachment evidence and then turned around and accepted the uncorroborated, self-serving testimony of Scott to the effect that there had been disputes between Scott and Frommhagen.

II. THE DECISION BELOW BARRING ADMISSION OF A SWORN EXTRAJUDICIAL STATEMENT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND CONSTITUTES A RADICAL AND UNACCEPTABLE DEPARTURE FROM ACCEPTED JUDICIAL PROCESS.

It is stated in Wigmore on Evidence, Chadbourne Edition (1972):

> Section 1048: The statements made out of court by a party-opponent are universally deemed admissible, when offered against him. (Emphasis added)

> Section 1048(4): The probative value, therefore, of the use of admissions is twofold: In the first place, all admissions may furnish, as against the opponent, the same discrediting inference as that which may be made against a witness in consequence of a prior self-contradiction; the nature of this inference, both in its strength and in its weakness, has been already examined in Section 1018 and need not here be reconsidered. In the next place, all admissions, used against the opponent, satisfy the hearsay rule, and, when once in, have such testimonial value as belongs to an testimonial assertion under the circumstances; and the more notably they run counter to the natural bias or interest of the party when made, the more credible they become; this element adding to their probative value, but not being essential to their admissibility.

Upon those tenets federal Courts of Appeals have held that an extrajudicial statement of a party to any action, criminal or civil, are binding upon him and substantive evidence against him. See Harrison vs. United States (10th Cir. 1930) 42 F2d 736; Gonzales vs. Landon (9th Cir. 1954) 215 F2d 955; United States vs. Goldberg (2d Cir. 1961) 290 F2d 729; Butler vs. Southern Pacific Co. (5th Cir. 1970) 431 F2d 77, 80.

The ruling of the District of Columbia Superior Court. as countenanced by the District of Columbia Court of Appeals, whereby the Court excluded Scott's sworn statement before the Grievance Committee, an administrative committee of another court, represents a radical departure from the rulings of other Appeals Courts and from the universal practice of all courts, which requires the supervision of this Court.

Even assuming, arguendo, that the grievance proceeding, due to the fact that it was under the auspices of a federal court, was a collateral judicial or quasi-judicial proceeding, which petitioner denies, it has

also been held universally that pleadings in other actions, attested to by parties, are admissible in another judicial proceeding. This Court in Pope vs. Allis (1885) 115 US 363, established that pleadings in equity or in law, if sworn by the party, are receivable as a "solemn admission." Other Appeals Courts have hewed to that principle. See Frank R. Jelleff, Inc. vs. Braden (D.C. Cir. 1956), 233 F2d 671; Great American Ind. Co. vs. Rose (5th Cir. 1957) 242 F2d 269; Rapid Transit Lines, Inc. vs. Wichita Developers, Inc. (10th Cir. 1970) 435 F2d 850.

There is no rationale for excluding impeachment evidence from a collateral grievance proceeding, particularly when, as in this case, it was agreed that the court decision would control. However, those courts were determined that the truth regarding a member of their Bar would not see the light of day. Petitioner is very certain that those Courts and Mr. Scott, a member of the Bar of this Court and of the District of Columbia, realized that Scott intentionally defaulted upon his obligation either to represent Frommhagen or to give Frommhagen sufficient advance notice of the termination of their relationship so that Frommhagen's position in this Court would not be prejudiced. How can it be expected that Frommhagen or any other person can have confidence in the courts, the grievances committees, and the bar associations when a travesty such as this has been allowed to take place ??

CONCLUSION

For the reasons stated, petitioner requests that a writ of certiorari issue to review the judgments and orders of the District of Columbia Court of Appeals.

Dated: July 26, 1973, Soquel, California

Respectfully submitted,

LAURENCE H. FROMMHAGEN
Pro Se

(Appendix Follows)

APPENDIX

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

LAURENCE H. FROMMHAGEN	)	Civil Action
Plaintiff	)	No. 656-72
v.	)	
BYRON N. SCOTT	)	
Defendant)		

MEMORANDUM ORDER

This matter was heard by the Court without a jury.

Plaintiff in this matter seeks damages, alleging that defendant, an attorney, failed to meet the obligations of a retainer agreement. In turn, the counterclaim seeks recovery for services rendered and, in addition, alleges libel.

Testimony in the case has been extensive and covers a period beginning in October 1967 and ending in September 1971.

In essence, the evidence shows that plaintiff, at the time of meeting defendant in 1967, was already engaged in litigation as to questions relating to his employment with a federal agency. Anticipating appeals through the federal court system, in 1969 the parties signed a document (Exhibit 1) calling for payment of $250.00 as a retainer. It further recites that services will cost $25.00 per hour and that a "refresher was to be paid if more than 10 hours." No money was paid at that time. Both parties agree that a primary purpose of the retainer was representation of the plaintiff in the United States Supreme Court. Plaintiff was represented by other attorneys in the federal courts in California. In June 1969, $250.00 was paid to defendant. During the period in question, there were numerous telephone conversations and exchanges of written correspondence. As the time for filing pleadings before the Supreme Court approached,

a dispute arose and plaintiff ultimately was represented in that Court by other counsel. He subsequently wrote a letter of complaint to the Washington Bar Association and that letter is the basis for the libel counterclaim.

It should be noted that there is conflict in the testimony as to many of the details of the above-stated circumstances. As pertinent, these matters will be treated more fully.

A pivotal question in this case is, of course, what, if any, agreement did the parties reach? It is clear that the written memorandum (Exhibit 1) does not purport to be the entire understanding of the parties. Plaintiff states that defendant was to represent him before the Supreme Court and write a draft brief to be presented to the Court of Appeals. He maintains that consultations on related matters were to be uncompensated. Defendant agrees that he was to represent the plaintiff in the Supreme Court provided certain conditions were met. His version of the relationship differs. He asserts he was to be paid for all services rendered; he was to review matters submitted to the Court of Appeals and that Court costs and fees were to be paid by plaintiff prior to action in court.

This Court finds that there was no meeting of the minds on the agreement asserted by plaintiff. Indeed some of the correspondence between the parties indicates an uncertainity in this regard. See Exhibits 5 and 7. Additionally, it is unlikely that the numerous consultations and inquiries directed to defendant were to be performed without compensation. See Exhibits 2, 3, 4 and 9.

It is concluded that defendant has performed legal services for the money received.

Plaintiff also urges that defendant was negligent in the performance of his duties as an attorney. More specifically, it is asserted that defendant's conduct unreasonably jeopardized plaintiff's case in the Supreme Court. This is a closer question. It is clear plaintiff made repeated requests regarding the matter. Defendant responds that questions of attorney's fees, court costs, printing costs were unresolved. Defendant was to come

to Washington, D.C. but failed to do so. In such circumstances, defendant states he refused to sign the petition as counsel without control over its final form of printing.

In evaluating this latter claim, it is readily seen that there are circumstances which support both parties to this dispute. It is apparent that plaintiff relied upon defendant for certain representation. However, it is equally clear that lawyers do not normally relinquish control of editing and printings of pleadings to the client. Other illustrations of this type of counterbalance can be cited.

The Court finds that the evidence on this record does not rise to the level of proof by the preponderance of negligence.

Similarly, defendant's counterclaims must meet the same fate. The count in contract is not supported by a preponderance of evidence.

The claim of libel suffers from inadequate proof of malice. But passing that point, the Court finds that the qualified privilege to speak on matters of common interest and to protect one's own interest was properly and reasonably exercised in this instance.

It should be noted that this Court is aware of grievances now pending before the Grievance Committee. Naturally, I have no authority in that regard and thus have striven to insulate that proceeding from the present one.

It is ORDERED that the trial finding and judgment be against plaintiff on its primary claim.

It is further ORDERED that the trial finding and judgment be against counterclaimant on the counterclaims.

WILLIAM C. PRYOR
Judge

Dated: June 7, 1972

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 6703 January Term, 1973

LAURENCE H. FROMMHAGEN, Appellant,

v. CA 656-72

BYRON N. SCOTT, Appellee.

Appeal from the Superior Court
of the District of Columbia
Civil Division

BEFORE: Pair, Yeagley and Harris, Associate Judges

J U D G M E N T

This case came on to be heard upon the record from the Civil Division of the Superior Court of the District of Columbia and, without argument, was submitted on the briefs of counsel.

Upon consideration whereof and after review of the record and briefs, the court is of the opinion that the judgment of the trial court is supported by the evidence and is not plainly erroneous, from which it follows that this court may not substitute its judgment. D.C. Code 1967, Section 17-305 (Supp. V, 1972).

Accordingly, it is this 28th day of February 1973,

ORDERED and ADJUDGED that the judgment of the trial court be, and the same is hereby, affirmed.

PER CURIAM.
FOR THE COURT:
ALEXANDER L. STEVAS
CLERK

v.

DISTRICT OF COLUMBIA
COURT OF APPEALS

Filed April 9, 1973

No. 6703 January Term, 1973

LAURENCE H. FROMMHAGEN,

Appellant,

v.

CA-656-72

BYRON N. SCOTT,

Appellee.

BEFORE: Reilly, Chief Judge, Kelly, Fickling, Kern, Gallagher, Nebeker, Pair, Yeagley and Harris, Associate Judges.

O R D E R

On consideration of appellant's petition for rehearing en banc and it appearing that no judge has called for a vote on said petition, it is

ORDERED that appellant's petition for rehearing en banc is denied.

PER CURIAM

Santa Cruz Sentinel - Sunday, April 22, 1973- Page 21

FROMMHAGEN PLANS TO TAKE CANDIDACY ISSUE TO COURT

Laurence Frommhagen of Soquel expects to argue his case for being an independent candidate for Congress before the U.S. Supreme Court in November.

He said his two main points of contention are that independent candidates cannot be certified until two months before a general election, while party candidates make announcements some eight months in advance of an election.

Also, that members of political parties are not allowed to sign nomination papers of an independent candidate. Frommhagen claims both provisions are in violation of the equal protection clause of the U.S. Constitution.

Frommhagen became disillusioned with both major political parties and last year attempted to run for Congress as an independent candidate. However, his name was barred from the ballot for a state election law that says a person can't run as an independent if he has been registered with a party within a year preceding a primary election.

Frommhagen, who was missing for three weeks from October 15, said an investigation in that case is continuing. He does not remember what happened in that period, but Sheriff's detective Ken Foster said "we can't doubt the possibility that someone drugged him. Our investigation at this point is at a standstill."

The last thing Frommhagen recalls at that time is walking to his car from a restaurant on Route 280 near San Francisco. He was found again on Nov. 9.

He said he is concerned that the incident "has placed a cloud on my name," but that he plans to pursue finding out what may have happened during those three weeks.

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SUPPLEMENTAL BRIEF
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SUPPLEMENTAL BRIEF
In Support of
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to the District of Columbia Court of Appeals

Petitioner requests that the Court consider the following additional representations and argument in support of his Petition for a Writ of Certiorari.

I. THE FEDERAL OMNIBUS CRIME CONTROL ACT OF 1968 PREEMPTED ALL STATE LEGISLATION REGARDING THE RECORDING OF TELEPHONE CONVERSATIONS.

Respondent may well argue, as he did in the Appellee's Brief before the District of Columbia Court of Appeals, that "reception of the tapes would have put F [Frommhagen] in violation of Title 23-542 of the District of Columbia Code (1967 Ed.)," and may continue to ignore the fact that the District of Columbia Code was amended in 1970 to conform to the provisions of the 1968 Federal Omnibus Crime Control Act. Section 23-542(b)(3) of the District of Columbia Code (1970 Ed.) is a replica of Section 2511(2)(d), 18 U.S.C.,

wherein it is stated that it is not unlawful for a telephone conversation to be recorded with the consent of only one party to the conversation unless such interception is made for the purpose of committing any criminal or tortious act. The recordings of the telephone conversations at issue were made in the summer of 1971 and disclosure to the courts was attempted in May of 1972; clearly the petitioner was not in violation of any District of Columbia law.

If there was ever any doubt as to the legality of recording telephone conversations in California under the Invasion of Privacy Act at Section 632 of the California Penal Code, that doubt was erased by the California Supreme Court in Halpin v. Superior Court of San Bernardino County (1972), 495 P2d 1295. In that decision the Court, noting the very language of the Federal Omnibus Crime Control Act at Section 2510(1), 18 U.S.C. and the intent of Congress, ruled that said Act at 18 U.S.C., Section 2510 et seq. preempted the state legislation. Inasmuch as Section 2510(1), 18 U.S.C., defines "wire communication" as "any communication made...through the use of facilities...furnished or operated by...a common carrier...for the transmission of interstate or foreign communications" it is obvious that all existing federal and state legislation was preempted by that comprehensive national legislation.

Respondent never brought to issue in the Courts below whether Frommhagen's acts in recording and attempting to disclose those recordings was done to commit a criminal, tortious or injurious act; rather, he dwelt on an invalid, superceded section of the District of Columbia Code.

In the ruling prohibiting the admission of the tape recordings (see page 5 of the Petition for a Writ of Certiorari) the Court stated:

> Now there are variations and implications as in every case so it could be argued as you do here that a beep tone puts him on notice so you don't have to tell him, but a beep tone could mean a lot of things.

The trial judge's clerk later explained to the

petitioner that the judge, in yet another demonstration of his bias against the petitioner, had in mind the possibility that the beep tones could be dubbed onto the tapes after the conversations were recorded. However Frommhagen submits that even under those circumstances the recording by one party of a telephone conversation without the consent of the other party would be permissible if there was no intent on the part of the recording party to commit a criminal, tortious or injurious act. Such an act might be in violation of the tariffs of the local telephone company. However, as an official of the Chesapeake and Potomac Telephone Company said after the disclosure that President Richard M. Nixon had been recording telephone conversation without the knowledge or consent of the other parties to the conversations (as reported in The San Francisco Chornicle, July 17, 1973, page 18):

> Normally if we discovered such a violation we'd notify the customer and ask him to stop doing it. I suppose if they continued the recording we could remove their phones. But I don't know what we would do about the the White House.

It is reiterated that Frommhagen violated no federal or state statute or regulation. Indeed the trial judge refused to make even a preliminary inquiry as to whether there had been a violation of a local tariff just as he refused to consider any of Frommhagen's arguments. The trial judge had decided to accept Scott's uncorroborated testimony as to the content of those telephone conversations and he would brook no impeachment of that testimony.

II. THE RESPONDENT AND THE COURT WERE AWARE OF THE RECORDINGS OF THE TELEPHONE CONVERSATIONS BEFORE THE TRIAL COMMENCED.

The attention of this Court is directed to the following remarkable exchange between the Court and Frommhagen as it appears on page 19, at line 22 through page 20, at line 5, of the Reporter's Transcript (included in

the Record transmitted to this Court):

> THE COURT: All right. What position do you take?
> MR. STILLEY: This moment is the first time I have ever heard of such a thing. [the tape recordings]
> THE COURT: He didn't mention it at pretrial?
> MR. FROMMHAGEN: I didn't mention it formally at pretrial, but I think as Mr. Stilley told you this morning he certainly heard from me last Tuesday.
> THE COURT: No one told me until I asked you about it this morning.....

How could the trial judge possibly have known about tape recordings of telephone conversations to have asked Frommhagen about those recordings that morning (before the trial commenced) unless he had been told about them first. The answer is that the attorney for respondent, Mr. Stilley, knew about those tape recordings for some considerable time before the trial and yet he failed to make any discovery along that line; in fact, he cancelled a deposition from petitioner before the trial. With an apparent anxiety Mr. Stilley asked the trial judge on the morning before the trial commenced to suppress those recordings. The trial and appellate judges, desirous of protecting a brother-attorney, and on the most fallacious grounds, obliged by suppressing those recordings which would have impeached completely Scott's de novo testimony at the trial.

Yet another exchange between the Court and Frommhagen reveals the bias of the trial judge, as shown on page 20, line 19 through page 21, line 2, of the same Reporter's Transcript:

> THE COURT: Well, what was your reason for not clearing this the tape recordings with pretrial judge since obviously a great deal of thought was given to stipulations and identifications and evidence. Why not this item?
> MR. FROMMHAGEN: I think, Your Honor,

> this is in the nature, isn't it, of impeachment testimony or impeachment evidence which is not required to be divulged at pre-trial?
> THE COURT: Do you happen to know what the Federal Communications Commission rules are on recording telephone calls?

It will be noted that the Court did not answer the question posed by Frommhagen, but quickly changed the subject to regulations of the Federal Communications Commission. The trial judge must have known that it is the long-established and eminently reasonable rule of the District of Columbia courts, as well as many other courts, that impeachment evidence need not be divulged at pre-trial proceedings. Frommhagen did not reveal the tape recordings at the pre-trial hearing because he believed that Scott, true to form, would distort in his testimony some aspects of the content of the telephone conversations. As it did indeed develop, Scott testified perjurously during the trial that certain disputes involving the payment of fees and court costs took place between him and the petitioner during the subject telephone conversations; the tape recordings would have proven that no such disputes had taken place and that, in fact, Scott assured Frommhagen that he was preparing the petition for writ of certiorari and would have that petition filed in time with the Clerk of the United States Supreme Court. Scott sought to coverup his default with disputes that never took place, and the Court permitted him to do so.

III. THE CONSIDERABLE DECLINE IN THE ETHICAL STANDARDS OF THE LEGAL PROFESSION IS TRACEABLE IN LARGE PART TO THE ABSENCE OF ADEQUATE GRIEVANCE PROCEDURES AND THE WILLINGNESS OF MANY ATTORNEYS TO DISREGARD THE IMPROPRITIES OF THEIR ASSOCIATES.

Frommhagen believes fervently that this matter is just one more example of the unwillingness of bar associations and of the brother-attorneys who sit as

judges to insist that the ethical standards of the profession be maintained.

Mr. Justice Harry A. Blackmun, taking note of the many attorneys involved in the Watergate scandal and the growing lack of faith in the legal community on the part of the American public, admonished the delegates at the convention of the American Bar Association on August 5, 1973, to rededicate themselves to the high ethical standards for which the legal profession stands.

The problem is not confined to the legal community as shown in a forceful editorial in a recent issue of the American Medical Association Journal. That editorial was summarized in an article appearing in the San Francisco Examiner-Chronicle on November 4, 1973, excerpts of which follow:

> Abuse by practicing physicians in the United States ordinarily would be dealt with through the local medical societies or state medical examiners. In recent years, however, the American Medical Association had noted an increasing spate of complaints that professional ethics had lapsed....
> "Medical societes appear to have been reluctant to tackle tough problems relating to questionable actions by their members," charged the secretary of the AMA's Judicial Council on Medical Ethics, Edwin J. Holman. "It is amazing," he wrote, "how many excuses can be found for not conducting an investigation or for not taking action."
> He told The Times, state boards of medical examiners too often failed to judge or punish their colleagues for alleged malpractice. The rationale, he said, for not carrying out their duty was usually a reluctance to question the judgment of their fellow practioners or a fear of legal suit by doctors who might have been questioned regarding their professional conduct.

> "Neither excuse is more than that," Holman had written- "it is merely an excuse."

Petitioner respectfully submits that all of the foregoing statements apply equally to the legal profession.

The petition herein, this supplemental brief, and the Record transmitted to this Court demonstrate that Frommhagen was placed in a double-bind situation wherein the Grievance Committee and the Superior Court each insisted that he go to the other agency with his evidence, but neither agency would admit that evidence and both agencies insulated their proceeding from the other. Furthermore, the Court permitted Scott on the pretext of a $50,000 libel suit directed to petitioner's grievance complaint, to escalate the matter from the Small Claims Court to the Superior Court by way of attempting to intimidate Frommhagen, and then allowed Scott to engage in any number of delaying tatics. It is little wonder that so many in the general public have so little respect for the legal profession and the courts.

Petitioner realized from the beginning that it is almost impossible to have a grievance complaint adjudicated fairly and expediously, unless it involves a major malfeasance which has received widespread public attention. As a NASA employee he posted serious grievances against the top management of NASA, only to be fired after he had won those hard-fought grievance proceedings; he has similarly filed grievances as a consumer and as a member of a real estate association. All of those proceedings were marked by an obsessive concern of the profession or the business to protect itself even at the risk of damaging or destroying their standards; that trend appears to be accelerating.

Frommhagen has gone to great trouble and expense to perfect this matter for the consideration of this Court. He can go no further, and can only hope and trust that this Court, perhaps by way of expressing its concern for the efficacy and integrity of

those procedures whereby the standards of the profession are maintained, will review this matter and provide relief.

Dated: November 8, 1973, Soquel, California

Respectfully submitted,

LAURENCE H. FROMMHAGEN
Pro Se

[redacted]

[redacted]

Byron N. Scott, Respondent

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF FOR RESPONDENT IN OPPOSITION

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Press of Byron S. Adams Printing, Inc., Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-210

LAURENCE H. FROMMHAGEN, *Petitioner*

v.

BYRON N. SCOTT, *Respondent*

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Byron N. Scott, appearing *pro se* and at the request of the Court, opposes the issuance of the petition for Writ.

QUESTION PRESENTED

The Petition purports to pose two questions for this Court but, since the Trial Court, sitting without a jury, did not exclude the alleged "magnetic tape recordings" for the reason ascribed by petitioner (See Petition, page 4) and since the Trial Court ruled that there was no question of credibility as far as the controlling issue in this case, breach of contract, was concerned, the real question is whether there was anything in the pleadings, the pre-trial order or the trial itself to justify certiorari by this Court to force the

Trial Court to listen to the "tapes" or read respondent's answer to a grievance which was dismissed for lack of merit. The answer must, of course, be "no" as will readily appear when the material facts are stated correctly.

STATEMENT OF THE CASE

Petitioner (hereinafter Frommhagen) sued respondent (hereinafter Scott) alleging breach of a contract "to represent him before the Supreme Court" and demanding return of the "retainer" he had paid, plus costs. Scott denied liability on the grounds of performance, prior breach with resultant impossibility of complete performance and also counter-claimed for services rendered and for damages for libel. The Trial Court found that from October of 1967 to September 1971, Scott had performed legal services for Frommhagen for the $250.00 he had received; that the "retainer" memorandum the parties signed did not purport to be the entire understanding of the parties; that there had been "no meeting of the minds on the agreement asserted by the plaintiff"; and that Scott had been justified in refusing to sign the Petition or pay for its printing when Frommhagen had refused to make the deposit for the filing fee and the printing costs and had insisted on having the Petition printed in California. The Trial Court also held that Frommhagen had failed to prove by a preponderance of the evidence that Scott had been guilty of negligence in his dealings with Frommhagen. The Court disposed of Scott's counter-claims on the same grounds. At pre-trial, the parties stipulated to certain material and controlling facts which were read into the record at the trial. References in the text are to the pre-trial stipulations by number.

Frommhagen, in late 1967, had asked Scott for legal advice on problems which he then had and expected to have in connection with his Federal employment with NASA (1,2). A year went by and, in the fall of 1968, Frommhagen, who by that time had been fired by NASA, asked Scott if he would prepare and file a petition for certiorari in this Court when the U.S. Court of Appeals for the 9th Circuit affirmed an adverse summary judgment the U.S. District Court for the Northern District of California had entered on September 9, 1968 in a libel suit Frommhagen had filed with it against one of his superiors. Frommhagen, represented by California counsel, had appealed this judgment. Scott said that he would do so for a fee (4,5,6,7). Scott heard nothing further from Frommhagen until February of 1969, on the 6th day of which, the parties, during a conference, signed a "retainer agreement for $250.00 for 10 hours of legal services with a provision for a refresher". Frommhagen also "promised to pay all costs specified by Scott connected with the filing of the petition, if it were filed" (8,9). Frommhagen finally paid the $250.00 on June 13, 1969 and coupled it with a request that Scott prepare a rough draft of a "Brief for Appellant" for the Court of Appeals (10,11,12).

From June of 1969 to September of 1971, Scott performed various legal services for Frommhagen, including but not limited to telephone consultations on some of Frommhagen's many problems, legal research, letter writing, legal opinions and advice, preparation of a "list of points" to be included in the Court of Appeals brief, and the drafting of a petition for presentation to this Court (13,16,17,21,22,23,24,25,27). The 9th Circuit affirmed on April 27, and denied a Petition

for Rehearing on June 8, 1971. On June 18, 1971, Frommhagen, by telephone, renewed his request for Scott to prepare and file a Petition for a Writ of Certiorari. Scott agreed to perform; asked for a deposit of $100.00 for the filing fee; a deposit of $350.00 as an advance against estimated printing costs; and told Frommhagen that he would not do anything about printing the petition until he had both sums in hand (18,19,20,21). At the trial, Scott testified that during this telephone conversation he told Frommhagen that he had ninety days from the date the Court of Appeals denied the Petition for Rehearing to file the petition in this Court. Frommhagen insists that Scott said ninety days from the entry of the mandate of the Court of Appeals. Scott heard nothing further from Frommhagen until August 9, 1971, at which time he received a file, not the record, on the libel case from Frommhagen. In the letter attached to it, Frommhagen directed Scott to prepare and file the petition and promised to be in Washington, D.C. at some time between August 24 and 27. On August 12, Scott advised Frommhagen by letter that a petition for a writ would be denied and advised him to save the money it would cost to print the petition and file it. On August 17, Frommhagen called Scott over the phone; told him to prepare the petition and again talked about the filing fee and printing costs (21,22,23,24). At the trial, Scott testified that in this conversation he told Frommhagen that he would not put up the filing fee for him and that he must come up with the money for the printing costs. Scott also testified that in the conversation F ommhagen promised to bring the required money with him when he came to Washington later that month. Scott prepared a draft of a petition for certiorari (26,27,28,29). Frommhagen did not show

up in Washington at the appointed time and on August 31, Scott received a telegram from him saying that he would not be in Washington until September 10, 1971 (25). At the trial, Scott testified that he waited for Frommhagen to call which he did on September 1. Scott also testified that Frommhagen, during this telephone conversation objected to the size of the estimated printing bill; said he could get it done cheaper in California; and asked Scott to send the draft to him there. Scott also testified that he told Frommhagen that he (Frommhagen) could not get it printed in California and back to Washington in time to file it but Frommhagen said that he had "made arrangements" so that he could get it printed and fly to Washington with it in time to file it on the due date. On September 2, Frommhagen and his California attorney called Scott and asked him to send the draft to Frommhagen in California (26). Scott testified he told Frommhagen's lawyer that he could have the petition printed in Washington and file it on time if Frommhagen would send the money. Scott also testified that he told Frommhagen's lawyer that if he (Scott) had to send the draft to California for printing, it would be "up to Mr. Frommhagen." When Frommhagen and his lawyer insisted, Scott sent the draft to California by air mail, special delivery on September 3 (26, 27). The draft provided for signature by Frommhagen, *pro se* (30). The only money Frommhagen ever paid to Scott was the $250.00 paid on June 13, 1969. He never did make a deposit for the filing fee or the printing costs (31). Frommhagen later asked for additional time in which to file a petition which request was granted by Mr. Justice Douglas and a petition was filed by a California lawyer. It was denied.

At the trial, Frommhagen sought to introduce an answer Scott had made to one of the Frommhagen grievances "as in the nature of impeachment testimony." The Trial Court excluded the "answer" saying it was not "proximate enough to what I have to decide to make it substantially important on the question of credibility." In his brief to the Appeals Court below, Frommhagen said that he had attempted to introduce the answer "for the purpose of impeaching Scott's testimony that he had always known that the date of June 8, 1971 tolled the beginning of the ninety day period for filing the petition for writ of certiorari (hence September 6 was the last day for said filing), that he had researched that point several times, and that Frommhagen had coerced him into putting the date of September 13, 1972 in his rough draft of the petition" (page 5). But—Scott had made no such testimony and had not put the date of September 13, 1972 in his draft of the petition. In his Petition, Frommhagen says that he sought to introduce the answer to impeach testimony by Scott that "he had known that the ninety day period for filing the petition for writ of certiorari tolled from the day of entry of the Court's denial of the petition for rehearing". He says that Scott's answer to the grievance had "admitted that he had believed erroneously that said period tolled from the day the Appeals Court issued its mandate." Scott had made no such admission.

In his petition, Frommhagen says he had sought to introduce the "magnetic tape recordings to prove Scott had not made demands of Frommhagen in telephone conversations in August of 1971 for additional legal fees and court expenses and printing costs". In his Brief to the Court of Appeals, he said that he had sought to introduce the tapes to impeach Scott's testi-

mony that Frommhagen had insisted that Scott relinquish control of the editing and printing of the petition. Scott did not testify that Frommhagen had insisted that Scott "relinquish control of the editing and printing of the petition". Frommhagen obviously forgot that it had been stipulated at pre-trial that he had discussed the filing fee and printing costs with Scott during the August 17, 1971 telephone conversation and that it had also been stipulated that Frommhagen insisted that Scott send the draft to California to let Frommhagen have it printed.

REASONS FOR REFUSING THE WRIT

1. Frommhagen agreed at pre-trial that on February 6, 1969, he had promised to pay all costs specified by Scott connected with the filing of the petition (9). He agreed at pre-trial that on June 18, 1971, Scott had said that he wanted the money for the filing fee and printing costs in advance of preparation of the petition (21). He agreed at pre-trial that he and Scott had discussed the filing fee and the printing costs in a telephone conversation on August 17, 1971 (24). He agreed at pre-trial that he had not given Scott the money for the filing fee and the printing costs (31). The Trial Court ruled correctly when he excluded these attempts to attack these stipulated to facts.

2. Frommhagen doesn't seem to be quite sure what he was trying to accomplish by offering the "answer" or the "tapes" but neither would have disproved the fact that he had agreed to pay all "costs" and then refused to do so.

3. The question of whether Frommhagen violated laws or regulations by recording telephone conversa-

tions without notifying the other party to the conversation would better be left to a case where it is the issue. It is not the issue here.

4. Of course prior inconsistent statements are admissible against a party and for impeachment purposes but not to disprove a fact to which the offeror has agreed at pre-trial.

5. Reception or exclusion of the "answer" and/or the "tapes" for the purposes for which Frommhagen has thought at different times he was offering them, whatever that might be, lay within the sound discretion of the Court and this discretion was not abused by the rejection of both.

6. Frommhagen had laid no proper foundation for reception of the "answer" and/or the "tapes".

7. President Nixon's difficulties with tapes presents no parallel for Frommhagen and his "tapes". No similar question is involved.

8. The judgment of the Trial Court was supported by the evidence and was not plainly erroneous. It should not, therefore, be disturbed.

For the foregoing reasons and because of the facts and circumstances in this case, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied and the petitioner left to other devices for venting his spleen against attorneys and the courts in researching for his said to be forthcoming "manuscript".

Respectfully submitted,

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MICHAEL

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-210

LAURENCE H. FROMMHAGEN, Petitioner,

vs.

BYRON N. SCOTT, Respondent.

PETITIONER'S REPLY BRIEF

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In the Supreme Court
OF THE
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OCTOBER TERM, 1973

No. 73-210

LAURENCE H. FROMMHAGEN, Petitioner,

vs.

BYRON N. SCOTT, Respondent.

On Petition for a Writ of Certiorari
to the District of Columbia Court of Appeals

PETITIONER'S REPLY BRIEF

I. RESPONDENT IN HIS OPPOSITION BRIEF DISTORTED AND MISREPRESENTED SEVERAL FACTUAL SITUATIONS.

In the Respondent's Opposition Brief, Scott represents that Frommhagen stipulated in the pre-trial proceeding that he (Frommhagen) had insisted that the petition be printed in San Francisco and had refused to pay printing costs and the filing fee. The Record from the Superior Court demonstrates that petitioner never made such stipulations at any time in the proceedings below. Indeed Frommhagen objected vigorously at the pre-trial proceeding to Scott's representations that Frommhagen had insisted upon a printing of the petition in California and that Scott had objected to that procedure during the telephone conversations. It is apparent from the Respondent's Opposition Brief that Scott therein distorted and transformed Frommhagen's stipulation that he had agreed to pay all court costs into a

stipulation that he refused to pay the costs of printing and filing fee. Petitioner never made the latter stipulation.

The tape recordings of the telephone conversations, so greatly feared by Scott, would have proven that there were no disputes regarding the prepayment of costs. During the telephone conversations in August and September of 1971, Scott, with no objection, agreed that the petition be printed in San Francisco (where Frommhagen would pay the printer) and that Frommhagen, when he came to Washington, D.C. before the due date, as calculated by Scott, of September 13, could pay the filing fee directly to the Clerk of this Court. Furthermore, Scott agreed during those conversations that, under such circumstances, the need for prepayment of costs did not exist. In fact, Frommhagen did come to the District of Columbia in October of 1971 when he paid the filing fee in the office of the Clerk and filed the out-of-time petition prepared by his San Francisco attorney.

In his Opposition Brief, on page 1, Scott asserts that breach of contract was the controlling issue. However, it is apparent from the Record and from the Opinion of the Trial Judge that Frommhagen's allegation of negligence was a separate and equal issue in the Courts below.

Scott represents on page 6 of his Opposition Brief that he told petitioner's San Francisco attorney that if the petition was to be printed in California "it would be up to Frommhagen" (whatever that means). However, the San Francisco attorney, Herbert W. Yanowitz, in a deposition dated March 15, 1972 and filed in the Superior Court prior to the trial, stated that all he had been told by Scott during that particular telephone conversation was that he (Scott) was representing Frommhagen and that the draft of the petition for writ of certiorari would be sent within a few days to the petitioner. Mr. Yanowitz had called only for the purpose of determining whether he should be substituted as Frommhagen's attorney.

In an array of statements on page 6 of the

Opposition Brief, the respondent seeks to convey the impression that he had always been aware of the correct due date for filing of the petition. However, in the draft of the petition, authored by Scott, included in the Record before the Court, there appears the following statement on the second page under Jurisdiction: "The judgment of the Court of Appeals for the Ninth Circuit was entered on April 27, 1971 to become effective June 15, 1971. This Petition was filed within 90 days of that effective date" (Emphasis supplied). Ninety days from June 15 was September 13. It is apparent that Scott believed, when he wrote that draft in late August, that the ninety day period tolled from the date of the issuance of the mandate. Furthermore the representations made by Scott on page 6 of the Opposition Brief are contradicted by his own testimony appearing on page 10 and 11 of the Reporter's Transcript covering a portion of the trial.

On Page 8 of the Respondent's Opposition Brief, under Reason No. 4, Scott alludes to a "fact" to which, he states, petitioner had agreed at pre-trial. But Scott does not state at any point in his brief the nature of that "fact." The Record shows that Frommhagen stipulated only that Scott told him during a telephone conversation on June 18, 1971, that the due date was ninety days from the issuance of the mandate. The tape recording of that conversation would have proven petitioner's position on that matter, as would have Scott's sworn Answer to the Grievance Committee. However, the Court was not going to brook any disruption of Scott's testimony, whether by the tape recordings of the telephone conversation, Scott's sworn, prior inconsistent statement, or the testimony of the petitioner. Unfortunately Scott's Answer to the Grievance Committee is not in the Record.

II. THE COURT NOTED THE TESTIMONY DURING THE TRIAL, NOT THE PRE-TRIAL STIPULATIONS.

In his ruling on the admissibility of the tape recordings (on page 22 of the Reporter's Transcript), the Trial Judge stated: "First of all, in the exercise of my discretion I feel that I have heard ample

evidence from the testimony here.." (Emphasis added). Neither at that time or at any other point in the proceeding did the Court refer to any pre-trial stipulations. The Court relied only upon the self-serving uncorroborated testimony by Scott during the trial in regard to the precise content of the telephone conversations, agreements as to costs, printing of the petition, etc.

III. RESPONDENT SEEKS, THROUGH DISTORTION, TO EVADE THE REAL ISSUES.

By blending distortions of the petitioner's pre-trial stipulations with excerpts of his own testimony, the respondent hopes to persuade this Court that the petitioner had agreed to certain "facts" at the pre-trial proceeding which permitted the Trial Court to disallow Frommhagen's attempts to impeach Scott's testimony. Petitioner never made such stipulations and the Trial Judge did not base his decisions on those or any other stipulations.

The central issue in this appeal remains the refusal of the Court's below to permit Frommhagen's attempts to impeach Scott's testimony with prior inconsistent statements contained in the tape recordings of the telephone conversations and in Scott's Answer to the Grievance Committee. It did not lie within the Court's discretion to exclude those attempts at impeachment and to accept only Scott's version of the events.

Petitioner respectfully requests the Court to compare Scott's representations in the Opposition Brief to the Record. It was with the expectation that Scott would attempt such distortions, as is his modus operandi, that petitioner insisted that the Record be transmitted to this Court. In addition, petitioner has requested the Court of Appeals today to transmit the depositions of Herbert W. Yanowitz.

Respectfully submitted:

LAURENCE H. FROMMHAGEN
Pro Se

November 19, 1973.